SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 521

ANDREW R. MALLORY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 98 US App DC 406; and 236 F 2d 701.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was dated and entered June 28, 1956. (R. 118).

The jurisdiction of this Court is invoked under Section 1254 Title 28 of the United States Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether a confession obtained from petitioner, a mentally retarded youth of 19 years of age, as a result of detention without benefit of counsel for approximately seven hours, during which time petitioner was subjected to prolonged questioning and to a "lie detector" test by federal officers for the very purpose of securing such confession during all of which time petitioner could have been taken before a readily accessible committing authority, is admissible in a criminal proceeding in a federal court?

2. Whether a written statement by this petitioner to police officers purporting to authorize them to search his home, obtained by them from petitioner at substantially the same time they obtained his confession constituted the voluntary consent necessary to make valid their subsequent search of his home without a warrant and render admissible against him in a criminal proceeding in a federal court incriminating evidence belonging to him seized by them during the search?

3. Where a jury, deliberating upon a charge of rape under a statute which expressly provides only for imprisonment for not more than thirty years of such offense provided that the jury may prescribe the death penalty if they should reach a verdict of guilty, came into the courtroom and asked the trial judge if they could be assured that the defendant would be imprisoned for life with no possibility of release, and the trial judge, in response, instructed the jury that he could give no such assurance; that even if he imposed the maximum sentence of thirty years he would have to also impose a minimum sentence of not more than ten years; and that at the expiration of the ten years the Parole Board would have to decide whether the defendant should be imprisoned beyond the ten-year minimum; and

the jury thereupon retired and after further deliberation of twenty minutes returned a verdict of "Guilty with the death penalty", was that instruction such interference with the function of the jury and such prejudicial error as to require a new trial?

Rules and Statutes Involved

Rule 5(a)(b) Federal Rules of Criminal Procedure:

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

Rule 41(e) Federal Rules of Criminal Procedure:

Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. . . . If the motion is granted the

property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . .

Title 22, District of Columbia Code, Section 2801.

Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: Provided further, That further That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

Fourth Amendment of the Constitution of the United States.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment of the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Statement of the Case

The petitioner, Andrew R. Mallory, was charged on May 3, 1954, in a single count indictment with the crime of rape upon one Stella R. O'Keane (R 1), an offense against the United States under the Code of laws of the District of Columbia. On May 14, 1954, after appointment of counsel, petitioner was arraigned, at which time the plea of Not Guilty was entered. However, because of numerous examinations by the Court appointed psychiatrists for the purpose of determining petitioner's mental competency to proceed with his trial, actual trial was commenced over a year later on June 21, 1955, before the Honorable Judge Holtzoff of the United States District Court for the District of Columbia, after a lunacy inquisition conducted immediately prior to the trial on the same day. (R. 9-16).

The protracted period resulted from conflicting determination by the Court-appointed psychiatrists as to the petitioner's mental competency, and re-examination designed to resolve them (R 2-7).

A verdict of Guilty was returned on June 24, 1955, at 5:15 o'clock, to which verdict the jury added the words, "with the death penalty." (R 108)

The evidence and proceedings are substantially as follows:

Stella O'Keane, complainant, stated that on Wednesday, April 7, 1954, at about ten minutes to six p. m. she went into the basement quarters of the apartment house at 1223 12th Street, Northwest, in which she occupied an apartment on the second floor. According to the complainant, she went to the basement for the purpose of washing some clothes in the washing machine in the laundry room; and when she experienced difficulty in detaching one hose from a water faucet and attaching another hose to the same faucet, she

knocked on the door to the janitor's quarters seeking help. Mrs. O'Keane identified the petitioner as the person who responded to her request, and stated that after he took the hose off he went back into the apartment. A few minutes later, while taking some clothes off of a clothes-line in another portion of the basement, according to Mrs. O'Keane, she happened to glance around, at which time she saw a man approaching her wearing a hat and a handkerchief over his face. The complainant stated that when she screamed the individual ran over to her, told her to be quiet and dragged her into the furnace room where he put her on the floor and had sexual relations with her. The only thing that the complainant could remember about the individual who molested her was that he had a handkerchief tied over his face, that his eyes were very bright, and that he wore a high slouch hat. Mrs. O'Keane was unable to identify the petitioner as the individual who assaulted her, stating only that her attacker was tall like the petitioner.

The petitioner, Andrew R. Mallory, lived in the janitor's quarters with his half-brother and his family, including Milton Mallory and Luther R. Mallory, Jr., who were sons of petitioner's half-brother. In the course of their investigation of the assault on Mrs. O'Keane, the police took into custody both Milton and Luther R. Mallory, Jr., and also the petitioner. Officer Yuter arrested the petitioner on Thursday, April 8, 1954, between two and two-thirty p.m., at 1258 Owens Place, Northeast (R. 21). Petitioner was taken directly to Police Headquarters at 3d and Indiana Avenue, Northwest, arriving there at about three o'clock in the afternoon (R. 21). Because the Sex Squad Office was crowded at the time, petitioner was immediately taken to the Police Identification Room on the third floor, at which time interrogation was commenced by Yuter in the presence of Officers Mackie, Tate and Elliott. Petitioner denied that he had done anything in connection with this

crime (R. 22). Officer Yuter stated that Sergeant Elliott also asked petitioner questions in connection with the offense before he (Officer Yuter) was called out of the Identification Room to the Sex Squad Room (R. 22, 24).

Officer Elliott stated that he first saw petitioner around three forty-five on the afternoon of April 8, in the Identification Room, and that at the time in addition to Officer Yuter, Lieutenant Sullivan, the Officer in Charge of the Sex Squad, was also present. Elliott stated that he questioned Andrew Mallory about the attack on Mrs. O'Keane, and that petitioner denied any wrong-doing (R. 25-26). Officer Yuter stated that after he left petitioner shortly after three p.m. the next time he saw Mallory was at about ten forty-five p.m. in the Sex Squad Office on the same date of April 8, 1954 (R. 23). Officer Elliott also testified that after he left Mallory around four o'clock p.m. he next saw him some time between ten and eleven p.m., on the same date in the Office of the Sex Squad, at which time "practically every man in the Sex Squad was present at the time"; and that Officers Mackie and Tate and also Lieutenant Sullivan were talking to the petitioner (R. 26). Elliott stated that it was at this time that petitioner said that he was the person who had attacked Mrs. O'Keane.

Officer Mackie testified that he first saw petitioner in the Identification Bureau at about three p.m., on the afternoon of April 8th in the presence of Lieutenant Sullivan, Officers Elliott and Tate, and also Sergeants Ashley and Weaver (R. 29). According to Mackie, Sergeant Weaver also questioned the petitioner at the time (R 29). Also, Mackie stated that he saw the petitioner on the afternoon of April 8th from about three to four p.m., and later on that night from seven o'clock to some time after eleven p.m.; and that during that time, he and other officers in his presence questioned Mallory relative to the offense (R. 29-32).

Officer James K. McCarty, a member of the General As-

signment Squad of the Detective Bureau stated that he was called to Police Headquarters some time on the evening of April 8th and that shortly after eight p. m. he began interrogating Andrew Mallory about the alleged rape, at which time Mallory stated that he had not committed any crime and that he would take a lie detector test. McCarthy was with petitioner for a total period of about one and one-half hours, the two of them alone in a small room in which McCarty conducted a lie-detector examination (R. 73). Although denying implication in the crime for the great part of the time, according to McCarty, "shortly before the expiration of this one and one-half hours, Andrew first stated that he could've done this crime or that he might have done it. He finally stated that he was responsible and went into some detail as to what actually did occur."

Immediately after petitioner made the damaging admissions, McCarty called Officers Mackie and Tate from the Sex Squad. In his testimony McCarty described the small room in which he examined and interrogated the petitioner with the door closed; and gave a detailed description of the machinery with its various dials and controls, comparing it generally with a dash board on a car or the control panel on an airplane (R. 72-76). During the actual examination there was a hose connection from the instrument panel to the petitioner's chest for the purpose of recording his breathing. Another connection was established between the machine and petitioner by a hose leading to a wrist cuff that fastened around one wrist of the petitioner. This was for the purpose of checking his blood pressure. In addition, a connection was set up between the machine and the fingers on petitioner's other hand by a wire attached to petitioner's fingers with some tape. McCarty stated that, based on the thorough briefing which he had received from the other officers, he proceeded to interrogate peti-

tioner while he was connected to the machine. For a very brief period after the machine was disconnected, according to McCarty, Mallory continued to deny implication; but then after he was "approached with sympathy" petitioner finally stated that he might or could have done it, and then launched into the confession. It was after this confession that Officer Mackie was called from the Sex Squad at about nine forty-five p.m., to the lie-detector room, at which time, according to Mackie, Mallory made a verbal confession to them. After that, at 11:07 p.m. petitioner was alleged to have made the same verbal statement in the presence of the complainant and other Sex Squad Officers. Close on the heels of the verbal statement, the written statement was made.

Immediately after the verbal admissions were made to Mr. Mackie at about ten o'clock p.m., some officers of the Sex Squad tried to get in touch with the United States Commissioner on the night of April 8, 1954, for the purpose of arraigning petitioner. Apparently the Commissioner was unavailable, and the petitioner was arraigned some time in the morning on April 9, 1954 (R. 64).

Officer Mackie stated that about the same time the written statement was taken, petitioner gave the police a "written statement giving us permission to go to the apartment" for the purpose of searching for the clothes that were worn by the petitioner at the time of the alleged attack (R. 34-39). Both the confession and the written "consent" were admitted over objection of petitioner, as were the items of clothing secured pursuant to the alleged "consent", with incriminating stains and substances on them.

Testimony was presented on behalf of the petitioner by Dr. Joseph W. Rome who was one of the psychiatrists appointed by the District Court to examine the petitioner after he was chosen for that purpose by the United States

Attorney's Office. Dr. Rom stated that he found the petitioner to be a dull, retarded young man, nineteen years old, with mental symptoms which led him to conclude that he was of unsound mind on July 7, 1954, (the time of his examination); and that in his opinion petitioner was suffering from the same mental illness at the time the alleged offense was committed. The only evidence offered by the United States Government bearing on mental condition was in the form of opinions expressed by Police Officers to the effect that at the time statements were taken from the petitioner he appeared to be of sound mind. Dr. Rosenberg, Deputy Coroner for the District of Columbia, who had given Mallory a pysical examination on the evening of April 8th, gave testimony to the same effect. The petitioner testified in his own behalf, at which time he denied committing any crime and stated that he had no recollection of ever admitting any such thing.

Evidence was concluded in the case on the evening of June 23, 1955, after the closing arguments, the Court charged the jury. In the course of commenting on the evidence, the Court stated that "Mrs. O'Keane identified on the witness stand the defendant as the person who raped her . . . " (R. 101).

At eleven fifty-three o'clock a.m., on June 24, 1955, the jury retired for its deliberations. At four fifty p.m., the jury was returned to the courtroom pursuant to a request or additional instructions. The jury foreman had sent a note to the Court couched in the following language: "have we other choice of verdicts than these four, (1) Guilty with death penalty, (2) Guilty as charged, (3) Not guilty by reason of insanity, (4) Not guilty. On #2 above: can we the jury be *assured* that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release—May the jury have a reading of the D. C. Code re: Rape?" (R. 106).

The Court informed counsel at the bench that as to question #2 he would answer "I cannot give them any such assurance". After informing the jury that the verdicts listed were the only possible ones in the case, Judge Holtzoff went on to instruct the jury relative to the inquiry having to do with punishment in the following language: "I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is thirty years, but even if the Court imposes the maximum, and, of course, I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of ten to thirty years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum. So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged". (R. 106-107).

The Section from the D. C. Code re rape was given in the following language: "Whoever has carnal knowledge of a female forcibly and against her will shall be imprisoned for not more than thirty years provided that in any case of rape the jury may add to their verdict if it be guilty the words "With the death penalty," in which case the punishment shall be death by electrocution. Provided, further, that the jury fails to agree as to the punishment, the verdict shall be received, and the punishment shall be imprisonment as provided in this section." (R. 107).

The foreman indicated that all questions had been answered clearly and at four fifty-five p.m., the jury returned to the jury room for further deliberation and at five fifteen o'clock p.m., they returned to the jury box with a verdict of guilty with the death penalty.

On Tuesday, June 28, 1955, after a motion for a new trial was filed, argued and denied, petitioner was sentenced to die by electrocution (R. 110).

It is from this verdict and this judgment that petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. On June 28, 1956, the judgment was affirmed by a divided Court, Judge Bazelon dissenting.

A petition for a writ of certiorari was filed in this Court on July 28, 1956. Certiorari was granted on October 22, 1956.

Specifications of Error to Be Urged

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding admissible a confession extracted from the petitioner, a mentally retarded youth of nineteen years of age, at the end of a seven and a half hour period of detention without counsel, during which period he was subjected to intermittent questioning and a "lie detector" test by Federal officers in the face of repeated denials of guilt, despite the fact that he was arrested during the regular business hours of the day and interrogated within a stone's throw of between 35 or 40 officers qualified to act as committing magistrates.

2. In holding that the search for, and seizure of, certain critical items of clothing was pursuant to the type of voluntary consent required for such search and seizure in the absence of a warrant.

3. In labelling as proper the trial court's supplemental instruction to the jurors in answer to questions relative to the certainty of petitioner's life-time imprisonment, in which instruction the court, in addition to pointing out a lack of assurance of such penalty set out the penalty for the crime in both its maximum and minimum terms and,

in addition, pointed out the prerogative of the Parole Board to release the defendant at the end of the minimum period, if it so desired.

Summary of Argument

I

An alleged confession obtained from a defendant who is a nineteen-year-old near moron, at the end of a period of seven or eight hours of detention without the benefit of counsel, and during which time he is subjected to repeated questioning in the face of repeated denials of complicity, and is finally subjected to a lie detector test and more questioning by Federal officers for the very purpose of securing an incriminating statement, and during which time the accused could have been taken before a readily accessible committing authority, is inadmissible in a criminal proceeding in a Federal court.

II

A written statement by the petitioner purporting to be his consent to the search of his home by police officers and given under the same conditions and circumstances as those described above and contemporaneously with the alleged confession fails to meet the standards of "voluntary consent" necessary to make valid the search without a warrant and thus rendered the fruits of such search inadmissible against him in the criminal proceeding in the Federal Court.

III

In prosecution for rape, where the jury had nothing to do with punishment of defendant except to the extent that under the statute they might impose the death penalty when, after deliberating for several hours the jury asked whether they could be assured that defendant would serve the balance of his life in prison if they did not impose the death penalty,

the Court committed prejudicial error when it stated that it could give no such assurance; that the maximum penalty under the statute was thirty years, but that when the Court imposed the maximum it also was bound to impose a minimum not to exceed ⅓ of the maximum; and that even then, after service of the minimum, the Parole Board would determine whether the defendant should serve anything over the minimum sentence.

Assuming, *arguendo*, that there was any obligation on the Court to answer the inquiry, there was no reason to mention the punishment; and further assuming, *arguendo*, that the punishment should have been mentioned, the Court should have confined its remarks to the language of the statute governing the crime. The function of the Parole Board and the range of possibilities inherent in their function had no relevance to the jury's determination except to emphasize the speculative possibility of early release and assure the petitioner of the death penalty under the circumstances surrounding the jury's inquiry.

ARGUMENT

I. The Confessions Were Erroneously Admitted Into Evidence

Evidence of both the oral and written confessions of the petitioner should have been excluded under the terms of the principle enunciated by this Court in *McNabb* v. *U. S.*, 318 U. S. 332 (1943) 6 S. Ct. 608, 81 L. Ed. 819, and popularly known as the McNabb rule.

Petitioner's alleged confession followed a seven and a half or eight hour period of detention, beginning about 2:30 P. M. and ending some time around 10 o'clock P. M. Only after the confession had been obtained (between 9:30 and 10 o'clock P. M.) did the police make the first attempt to con-

tact a committing magistrate for the purpose of arraigning petitioner.

It seems altogether clear that the failure to present petitioner before a committing magistrate at an earlier time was due to the deliberate disregard of Rule 5 F. R. Cr. P., on the part of the police in order that they might have time and opportunity to examine petitioner while he was still ignorant of the information which paragraph (b) of Rule 5 commands that he shall have; and in order that they might avoid the risk of having petitioner discharged by a committing officer for lack of probable cause—a very considerable risk in light of the paucity of evidence in their possession up to the time of confession. No other explanation for a failure to sooner present petitioner to one of the many committing officers who were within earshot of the place of detention can reasonably be inferred (R. 117). It would be frivolous to suggest that this delay was necessary because a committing officer was unavailable or inaccessible or that the police lacked the means of bringing petitioner before such officer. Indeed, nothing *compelled* delay; the police *chose* delay to gain time for interrogation and investigation.

The course which the police chose may be in accordance with the most efficient methods of crime detection; however, it runs head on against the procedure which Congress has prescribed. It needs must yield. Federal courts in such cases recognize the supremacy of the legislative will and, since 1943, have held inadmissible confessions obtained during periods of unnecessary delay, even if not procured by threats, coercion or promises, because procured "through such a flagrant disregard of the procedure which Congress has commanded . . ." *McNabb* v. *United States*, 318 U. S. 322 at 345. This principle of evidence suppression, popularly known as the *McNabb* doctrine, has since been reaffirmed by this court in *Upshaw* v. *United States*, 335 U. S.

410 (1948); *Brown* v. *Allen*, 344 U. S. 443, 476 (1953); and *Stein* v. *New York*, 346 U. S. 187-88 (1953).

The majority of the Court below has held that the *McNabb* rule is inapplicable here because (1) the delay was not "unreasonable", and (2) the evidence does not show that "the confession was due to the delay." (R. 112) The delay was reasonable, they say, because, since there were three suspects, time was required by the police to continue their investigation until they had developed evidence to support a charge against one of them, provided they didn't prolong the investigation "unduly". (R. 112) This is tantamount to the Court's holding that police, in the process of crime detection, may, while without evidence or knowledge of facts sufficient to justify a charge against any one of them, arrest three suspects and deliberately withhold all or some of them from presentment before an available and easily accessible committing officer, in accordance with Rule 5, until their investigation does develop facts sufficient to justify a charge, provided they don't investigate too long.

But the majority but begs the question. The question here is not whether the *investigation* was "unduly prolonged", but rather whether the *delay* was unnecessary and unreasonable. Rule 5 is not aimed at curtailing investigation, but at avoiding "all the evil implications of secret interrogation of persons accused of crime". *McNabb* v. *U. S.*, *supra*, at 344. It does so by affording them the safeguards contained therein.

We submit that the critical question, *i. e.*, whether delay in presentment solely for the purpose of facilitating investigation is unnecessary and unreasonable, was answered in *Upshaw* v. *United States*, *supra*, where this Court held inadmissible a confession under the *McNabb* rule on the ground that it had been obtained during a detention which was for the sole purpose of investigation, saying: "In this case

we are left in no doubt as to why this petitioner was not brought promptly before a committing magistrate, * * * because the officer thought there was not 'a sufficient case' for the court to hold him. * * * The argument was made to the trial court that this method of arresting, holding and questioning people on mere suspicion was in accordance with the 'usual police procedure of questioning a suspect . . .' However usual this practice, it is in violation of law, and confessions thus obtained are inadmissible under the McNabb rule." 335 U. S. at 414. The court below, itself, has heretofore, in like manner, vitiated a confession obtained under circumstances, in every essential respect, identical to those present here. *Akowskey* v. *U. S.*, 81 U. S. App. D. C. 353, 158 F. 2d 649 (1946).

We submit that "unnecessary delay" does not depend upon the time desired to keep a suspect away from the committing magistrate for the purpose of interrogation and investigation and making a case against him, as the Court below would have it, but rather upon the time required to bring the suspect before the committing magistrate. *See U. S.* v. *Leviton*, 193 F. 2d 848, 860 (1951) (dissenting opinion). The lower Court's interpretation seems to be squarely in conflict with the decisions of this Court and the general legislative policy underlying Rule 5.

It is suggested that Judge Bazelon adopted the correct yardstick for measuring *necessary* or *unnecessary* delay when he said:

> "'. . . the issue of whether there has been an 'unnecessary delay' in arraignment must be resolved, in every case, by deciding whether there have been reasonable and bona fide efforts promptly to seek a commissioner or other nearby officer." *Rettig* v. *United States of America*, U. S. App. D. C. Oct. 1956 No. 12697.

For its second reason for holding that the *McNabb* rule was inapplicable, the Court below held that there was no evidence that the confession "was due to the delay, such as it was" (R. 112). While the meaning of this cryptic statement is rather obscure, it seems to suggest that the lower Court is stubbornly clinging to its old "fruit of the illegal detention" concept which it attempted to read into the *McNabb* rule in *Upshaw* v. *U. S.*, 83 App. D. C. 207, 209, 168 F. 2d 167, 169 (1948). But this Court rejected this misinterpretation of the *McNabb* rule and pointed out that "[t]he *McNabb* confessions were thus held inadmissible because the McNabbs were questioned while held in 'plain disregard of the duty enjoined by Congress upon Federal law officers' promptly to take them before a judicial officer." *Upshaw* v. *U. S.* 335 U. S. 410, 413. We submit that under the *McNabb* and *Upshaw* decisions a confession obtained at the end of a period of detention during which the petitioner is withheld from presentment solely for the purpose of obtaining such confession is illegal, without resort to any independent exposition of the casual relationship between the detention and the confession which the lower court's obscure "due to" test would seem to call for.

Finally, it is suggested that even the standard adopted by dissenting members of this Court in *Upshaw, supra,* outlaws the confession obtained under the circumstances of this case. 335 U. S. 429, 93 L. Ed. 111.

II. The Alleged Consent to Search Was Invalid and the Consequent Seizure Illegal

This Court and inferior Federal Courts have held that "consents" to search homes without warrants must be proved by clear and positive testimony and that the prosecutor must establish that there was no duress or coercion, actual or implied; and that the Government must show that

the consent is freely and intelligently given.[1] In *Judd* the Court stated that the burden on the Government is particularly heavy in establishing the validity of such consent where the individual is under arrest. In both *Judd* and *Nelson, supra*, it was stated that the circumstances of an arrested defendant's plight might be such as to make any claim of consent "not in accordance with human experience".

Applying the doctrine enunciated in the cited cases, whether or not valid consent was given by Mallory to the search and seizure must be determined by appraisal of the entire set of circumstances; and essential to that appraisal is an examination of the influences at work on Mallory, and also an evaluation of the petitioner himself. To contend that the nineteen year old, poorly educated, dull and retarded petitioner, who had been held in custody for seven or eight hours without any attempt to arraign him, and who had been questioned intermittently and persistently during his period of illegal detention by varying groups of police officers, gave to those police officers a voluntary, free and intelligently made "consent" to do anything is to swim upstream against both logic and well-established principles of law as enunciated by this Court. It is urged upon this Court that appraisal of the entire set of circumstances, along with examination of the influences at work on Mallory, together with evaluation of Mallory himself, reveal a situation much more flagrant than that which existed in either *Judd* or *Nelson;* and that, as a matter of law, the evidence was inadmissible.

It is respectfully submitted that the Government failed in its burden of establishing the legality of the "consent",

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[1] *Amos* v. *U. S.*, 255 U. S. 312, 65 L. Ed. 654; *Judd* v. *U. S.*, 89 U.S. App. D. C. 64, 190 F. 2d 649; *Nelson* v. *U. S.*, 93 U. S. App. D. C. 14, 208 F. 2d 505.

that the admission into evidence of the incriminating articles of clothing, which were said to have seminal stains and other evidences of intercourse, was error which prejudiced the petitioner's right to a fair trial.

A consent to search, otherwise involuntary, cannot be regarded as adequate simply because obtained almost simultaneously with a confession, which itself is the product of illegal detention and psychological pressure.

But, apart from the Fourth Amendment consideration, petitioner submits that this Court, in the exercise of its supervisory powers, should exclude evidence obtained during a search based solely on an alleged consent obtained during an illegal detention, which detention is had for the very purpose of getting evidence. The fruits of such a search should be condemned because ". . . secured through such a flagrant disregard of the procedure which Congress has commanded . . ." *McNabb, supra.*

Simply put, it seems that logic dictates that the prosecution be denied any benefit from any evidence obtained from a defendant during a period of 'unnecessary delay' between arrest and arraignment.

Judge Bazelon expressed this view when he stated in his dissenting opinion, "I agree with the majority statement that the consent to the search was 'an immediate accompaniment to . . . and derives color from the confession.' On that account I would hold the one to have been as inadmissible as the other."

III. The Supplemental Instruction Regarding Possible Penalties Constituted Reversible Error

This case was prosecuted under 22 D. C. Code 2801. While that section empowers the jury to exact the death penalty, it does not empower it to "fix punishment" if the death penalty is not imposed. Accordingly, when the jury

sent its note to the trial court requesting information as to whether, in the absence of the death penalty, petitioner would be given a sentence which would assure them that he would die in jail, they were concerning themselves with matters that were totally irrelevant to their function. It would appear, therefore, that the proper course for the Court to have pursued would have been to refuse to answer and to admonish the jury that they were not to consider any of the matters inquired about. Such procedure was followed by courts in the following cases: *Sukle* v. *People*, (1941) 107 Colo. 269, 111 P. 2d 233; *Thompson* v. *State*, (1948) 203 Ga. 416, 47 S. E. 2d 54; *Strickland* v. *State*, (1952) 209 Ga. 65, 70 S. E. 2d 710; *Houston* v. *Commonwealth*, (1937) 270 Ky. 125, 109 S. W. 2d 45; *Williams* v. *State*, (1950) 191 Tenn. 456, 234 S. W. 2d 993; *Jones* v. *Commonwealth*, (1952) 194 Va. 273, 72 S. E. 2d 693, 35 A. L. R. 2d 761.

If, however, the Court felt compelled to depart from the above-mentioned rule, and to make some answer, that answer should have been confined to a simple "No" without further mention of punishment, but with the admonition that the information they sought was not proper for them to consider and that they should not speculate upon what might happen after their verdict. In this case, however, the trial court not only failed to limit itself in the manner suggested, but proceeded to give the jury a lecture on the range of punishment, the Indeterminate Sentence Act, and the authority of the Parole Board, thus inviting the jury to speculate upon possibilities with which they should not rightfully be concerned. Indeed, instead of cautioning the jury that these things were matters not to be considered by them, the Court appeared to emphasize the likelihood of early release for the petitioner, to the point of persuading them to impose the death penalty. Moreover, in light of

the circumstances surrounding the inquiry, the inevitable effect of the trial court's remarks was evident, and amounted to what the court, in *Thompson* v. *State*, *supra*, characterized as a "hanging charge".

Judge Bazelon (dissenting), in citing this development as reversible error, captures the total atmosphere of prejudice when he says:

> ". . . The judge must be ever wary, however, that the efficacy of the additional information be not far outweighed by palpable prejudice to the defendant.
>
> "This jury did not request information as to alternative sentences. It requested an *assurance* that if it did not impose the death sentence, the defendant would nevertheless receive a term long enough to make him die in prison; and that his sentence would not thereafter be modified by the judge, or commuted or pardoned by the executive or shortened by the parole authorities. 'In the instant case, this is what the jury wanted to know, and its purpose in seeking information is too plain for argument.' *Coward* v. *Commonwealth*, 164 Va. 639, 178 S. E. 797, 800 (1935). The information the judge supplied, in the light of the jury's purpose in requesting it, was grossly prejudicial to the appellant."

The only Federal case bearing specifically on this point is that of *Lovely* v. *United States*, 169 F. 2d 386. It is true that in the *Lovely* case there is no indication that the instruction relative to punishment if the death penalty were not imposed was given in answer to an inquiry. However, Judge Parker's language in discussing this point, at 169 F. 2d 391, seems to leave little room for any distinction to be drawn on the basis of gratuitious or requested information on this point. The Court stated "The jury had nothing to do with the punishment of the defendant, except that under

the statute they might decide whether or not he should be given capital punishment. . . . What they were to decide was whether the defendant was guilty or not and, if so, whether he should be given capital punishment. Whether he should be paroled after fifteen years, if not given capital punishment, was a matter which they could not decide and which should not have been called to their attention, even though they were told at the same time that they had nothing to do with it." Citing *Ryan* v. *U. S.*, 8th Circuit, 99 F. 2d 864; *Coward* v. *Commonwealth*, 165 Va. 639, 178 S. E. 797.

This language we think is dispositive of the issue.

A more recent case, *Jones* v. *Commonwealth*, 194 Va. 273, 72 S. E. 2d 693, 35 A. L. R. 2d 761, was decided in October 1952. This case is directly in point and cites the *Lovely* case as authority. As to whether or not any different rule should apply, depending upon whether the information is given gratuitously to the jury by the Court, or solicited from the Court by the jury, the Court states as follows:

> ". . . In State v. Carroll, 52 Wyo. 29, 69 p. 2d 542, a number of cases are reviewed and the court concludes that by the weight of authority reference to clemency which might be extended after verdict is ordinarily held not to be so prejudicial as to require reversal. In its opinion the court said it was not inclined to go as far as some of the cases had gone; that a voluntary statement by the court might have a tendency to influence the jury in their verdict, and hence should not be made; but it did not see how any good purpose would be served by refusing to answer on inquiry by the jury. It decided in that case that the jury had not been misled but said that in the future, upon inquiry made and answered fairly without suggestion as to what penalty should be imposed, the trial judges should tell the jury

that they should not speculate upon what might happen after the verdict.

"It seems to us that if it is thought necessary to tell the jury not to speculate about the information given, it is safer not to give the information at all, but rather to follow the rule of the *Coward* case and tell the jury that the information they ask is about something not proper for them to consider. The danger lies in the use made of the information and whether it is given voluntarily or involuntarily is not likely to control its use. . . ."

The underlying reason for withholding from juries the type of information given in this case is that in attempting to compensate for future clemency or what it might consider inadequate alternative punishment, the jury may impose a harsher sentence than would ordinarily follow from the crime. Such a practice would permit punishment to be based on highly speculative elements rather than on the relevant facts of the case, and necessarily would lead to unjust verdicts.

Under our system it would be most undesirable to have a jury's power to impose the death penalty exercised *negatively* as an expression of its disapproval of the scheme of punishment which the Congress has seen fit to establish, and thus thwart the legislative will. The importance of guarding against this is probably most aptly expressed by the Court in *Jones* v. *Commonwealth*, *supra*, thusly:

"It was the duty of the jury to fix the punishment according to the evidence and within the limits prescribed by law. It is clear that they were considering life imprisonment or a long term of years as proper punishment. It cannot be known whether they would have finally decided on such punishment, or to what

extent they were influenced to a verdict of death by a consideration of what we said in the Coward case if was not proper for them to consider; i.e., that a sentence of imprisonment might be set aside or cut down by some other arm of the State, acting under authority of a law of no less dignity than that which should govern the jury and possibly with a wisdom from the future not then available to the jury.

"The General Assembly of the Commonwealth, in addition to providing for pardon and for credit on prison sentences to encourage good behavior, has established a system of probation and parole looking to the rehabilitation of persons convicted of crime. The program has been in the main wisely administered and good results have been accomplished. There have been, of course, errors in judgment in individual cases. Such an instance may be in the mind of one or more members of a particular jury. But that jury, or any other, should not fix a defendant's punishment with the view of preventing the operation of laws that have been duly enacted for the handling of a prisoner after sentence in a way considered by the lawmakers to be in the best interests of the public and of the prisoner. To fix a defendant's punishment on that basis, quoting the Coward case [164 Va. 639, 178 SE 798] again, 'would be indefensible.'"

Conclusion

The action of the trial court in admitting the confession, and the evidence procured pursuant to the alleged 'consent to search', was violative of the standards formulated and prescribed by this Court for the conduct of criminal cases in the Federal courts.

The trial judge's supplemental instruction, the most damaging part of which was volunteered, exceeded the bounds

of judicial propriety and constituted indefensible interference with the jury function.

WHEREFORE, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia Circuit affirming such error should be reversed.

Respectfully submitted,

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